Petition

81-1447

NO. _____

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

Ben Loeterman and Mardi Loeterman,

Petitioners

v.

Town of Brookline and
Rent Control Board of Brookline,

Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS BEFORE JUDGMENT

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Question Presented for Review

Did the district court err in holding constitutional a town by-law which prohibits owners of condominium units from ever recovering possession of their units from tenants who have occupied the units since before the recording of the Master Condominium Deed?

List of all Parties

All parties appear in the caption of the case in the Court. The Attorney General for the Commonwealth of Massachusetts intervened in the case below.

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BY LAWS

Amendment to Article XXXVIII of the Town of Brookline By-Laws (Ban Amendment) . . . . . passim

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IN THE SUPREME COURT OF THE UNITED STATES

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TO THE COURT OF APPEALS BEFORE JUDGMENT

Opinion Below

The Federal District Court for the District of Massachusetts issued its Memorandum, Order and Judgment on November 6, 1981. The Memorandum and

Order are reported at 524 F. Supp. 1325 (1981) and have been reprinted at pages 1-6 to the appendix herewith.

Jurisdiction

The Judgment of the District Court to be reviewed is the final Judgment in the District Court case dated November 6, 1981.

Ben Loeterman and Mardi Loeterman filed a Notice of Appeal to the Court of Appeals for the First Circuit on December 1, 1981.

The Record on Appeal was timely docketed in the Court of Appeals for the First Circuit on December 11, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 18 of the Rules of this Court.

Constitutional Provisions and Statutes Involved

The texts of the Constitutional provisions and statutes involved appear at pages 8-12 of the Appendix.

Statement of the Case

The Loetermans entered into a Purchase and Sale Agreement on March 29, 1979, to purchase a condominium unit in a building whose rental apartments were controlled by the Town of Brookline, Massachusetts rent control by-laws. The Loetermans intended to occupy the condominium unit as their personal residence. At the time of the Purchase and Sale Agreement, the by-laws of the Town of Brookline enabled owners of condominium units to gain possession of the unit through specifically defined eviction procedures if they intended to use the unit as their personal residence.

On May 7, 1979, the Town of Brookline approved an amendment to the rent control by-laws (hereinafter referred to as the "Ban Amendment") which precluded the owner of an individual condominium unit from recovering possession of his unit from a tenant who had continuously occupied the unit since before the recording of the Master Condominium Deed. It was undisputed that the tenant residing at the Loeterman unit had continually occupied the apartment since before the Master Condominium Deed was recorded and that the Loetermans knew of the Ban Amendment before title to the unit actually passed to them on May 17, 1979. Under the Ban Amendment, the Loetermans could obtain possession of the Unit for their use and occupancy only upon the tenants' voluntary departure of

death. The tenant has refused to vacate the premises.

The Loetermans filed suit in the United States District Court for the District of Massachusetts seeking a binding declaration that the Ban Amendment was unconstitutional under the Fifth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment because it deprived the Plaintiffs of property without due process and was a taking of property for public use without just compensation. Jurisdiction was pursuant to the federal question jurisdiction of the Court, 28 U.S.C. §§1331, 1343(3), and the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202.

Plaintiffs and Defendants both moved for summary judgment. In a judgment dated November 6, 1981, the

District Court entered Judgment for the Defendants without interest or costs and upheld the constitutionality of the Ban Amendment.

Argument

THE QUESTION OF THE EXTENT TO WHICH A STATE OR MUNICIPALITY MAY REGULATE THE EVICTION OF TENANTS AS A RESULT OF CONDOMINIUM CONVERSION IS OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY THIS COURT IN GRANTING A PETITION FOR CERTIORARI BEFORE JUDGMENT IN THE COURT OF APPEALS.

In the past few years, the scarcity of rental housing caused in part by the conversion of rental units to condominiums has resulted in legislative action in a number of states to regulate the conversion process. See generally Synderman & Morrison, Rent Market Protection Through the Conversion Moratorium: Legal Limits and Alternatives, 29 DePaul L. Rev. 973 (1980); Schlein, Government Regulation of Condominium Conversion, 8 B.C. Env.L.Rev.

919 (1980). The Town of Brookline's by-law, which prohibits the eviction of tenants and thereby compels the condominium unit owner to become a landlord despite the owner's wish and intention to occupy the unit for personal or family use, is the most drastic measure yet enacted by a municipality to regulate the effects of condominium conversion.

It is essential that this Court define the extent to which municipalities can constitutionally regulate the conversion of rental housing so that renters, potential condominium owners and municipalities across the country may know the rights and interests of the parties involved in the purchase of a condominium unit. Although responding to the issue of condominium conversions has been acknowledged as "a priority

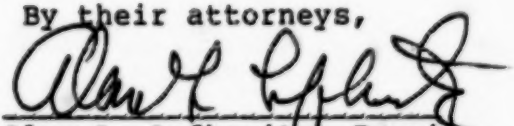
Congressional mandate", Foreword, The Conversion of Rental Housing to Condominiums and Cooperatives, United States Department of Housing and Urban Development (1980), no definitive legal standards have been developed by the Supreme Court since the early days of rent control. See e.g., Block v. Hirsch, 256 U.S. 135 (1921). If extreme anticonversion laws like the Ban Amendment constitute the unconstitutional taking of property without compensation as the Plaintiffs believe, the delay in declaring such laws invalid will cause undue economic and personal loss to owners unable to regain possession of premises purchased for their own use. In the meantime, such laws will continue to severely hinder those who cannot afford to purchase a single family house from

obtaining the American ideal of home ownership.

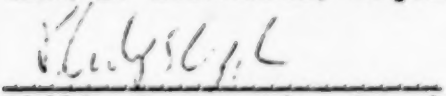
Conclusion

For these reasons this Court should grant Plaintiffs' Petition for a Writ of Cretiorari before Judgment in the Appeals Court.

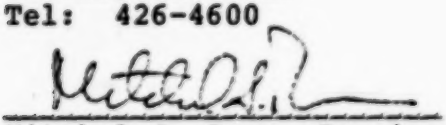
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January 28, 1982

Appendix

ministrative remedies. The important fact that the plaintiffs overlook is that their administrative appeal of the revocation of their FFH license was not taken before a court of general jurisdiction. The appeal was taken to the Commissioner of Public Welfare, who has authority to hear only appeals from actions taken by the Public Welfare agency. Minn.Stat. § 245.801 (1980). The Commissioner has no authority to consider and grant relief on a section 1983 claim.

[3] In addition to the foregoing reasons, the Court notes that section 1988 itself does not create an independent right of action to recover attorney's fees. In *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), a case decided prior to the 1976 amendment which added the attorneys' fees provision to section 1988, the Supreme Court ruled that section 1988 does not create a right of action. Its function is to authorize remedies for violations of the other civil rights statutes.[3] The language of the 1976 amendment adding the attorney's fees provision gives no basis for deviating from the conclusion reached in *Moor v. County of Alameda*. The provision allows recovery of attorney's fees "as a part of the costs" awarded "[i]n any action or proceeding to enforce" section 1983. By its terms, it does not contemplate an independent action solely to recover attorney's fees. Moreover, the legislative history makes it clear that the attorney's fees provision is part of the remedy only.

> The purpose and effect of S. 2278 are simple—it is designed to allow courts to provide *the familiar remedy* of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866.

S.Rep.No. 94–1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* [1976] U.S.Code Cong. & Ad.News 5908, 5909–10 (emphasis added).

Because section 1988 creates no independent right of action solely to recover attorney's fees incurred in a state administrative proceeding, and because the Court concludes that the administrative appeal in this case was not an action or proceeding within the meaning of section 1988, the complaint fails to state a claim upon which relief may be granted. Accordingly,

IT IS ORDERED that the defendant's motion to dismiss be, and hereby is, granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

3. This holding was reaffirmed after the 1976 amendment in *Monell v. Department of Social Services*, 436 U.S. 658, 701 n. 66, 98 S.Ct. 2018, 2041 n. 66, 56 L.Ed.2d 611 (1978).

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WEST KEY NUMBER SYSTEM

Ben LOETERMAN, et al., Plaintiffs,

v.

TOWN OF BROOKLINE, et al., Defendants.

Civ. A. No. 80–670–MC.

United States District Court, D. Massachusetts.

Nov. 6, 1981.

Condominium unit purchasers brought action against town and town rent control board seeking declaration that certain town bylaw amendment was unconstitutional under Fifth and Fourteenth Amendments and for injunction against enforcement of bylaw amendment. The District Court, McNaught, J., held that amendment, providing that owner of individual condominium unit was precluded from recovering possession of unit from tenant who occupied unit continuously since time before recording of master condominium deed, was not unconstitutional "taking" as applied to purchasers of condominium unit.

Summary judgment in favor of defendants.

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1. Eminent Domain ⇐2(1)

Generally, analysis whether governmental action results in a taking of private property violative of the Fifth Amendment requires weighing of private and public interest, as all governmental regulation by definition involves some curtailment of private rights to promote a public purpose. U.S.C.A.Const.Amends. 5, 14.

2. Eminent Domain ⇐2(1)

In connection with court's assessment of economic impact of regulation at issue which allegedly constitutes governmental taking of private property in violation of Fifth Amendment, attention is to be paid to extent to which regulation has interfered with property owner's distinct investment-backed expectations, and government need not compensate person for denying him right to use that which he has never owned. U.S.C.A.Const.Amends. 5, 14.

3. Eminent Domain ⇐2(1.1)

Town bylaw amendment, providing that owner of individual condominium unit was precluded from recovering possession of unit from tenant who occupied unit continuously since time before recording of master condominium deed, was not unconstitutional "taking" as applied to purchasers of condominium unit where, while purchasers entered into purchase and sale agreement from unit before town enacted amendment, actual purchase of property occurred ten days after amendment was passed and, under applicable rent control bylaws, purchasers were entitled to fair net operating income from their unit and retained other economic benefits ordinarily associated with ownership of rental property. U.S.C.A.Const.Amends. 5, 14.

Philip S. Lapatin, Gaston, Snow & Ely Bartlett, Mitchell S. Ross, Bernkopf, Goodman & Baseman, Boston, Mass., for plaintiffs.

David Lee Turner, Janet B. Fierman, Cathleen C. Cavell, Brookline, Mass., for Town of Brookline.

Roger R. Lipson, Brookline, Mass., for Rent Control Bd., Town of Brookline.

Gerald J. Caruso, Asst. Atty. Gen., Boston, Mass., for intervenor Atty. Gen. of Mass.

MEMORANDUM AND ORDER

McNAUGHT, District Judge.

This matter is before the court on the parties' cross motions for summary judgment. The plaintiffs are Ben and Mardi Loeterman, purchasers of a condominium unit in Brookline, Massachusetts, and the defendants are the Town of Brookline (the Town) and the Rent Control Board of Brookline (Rent Control Board). The Attorney General of Massachusetts has also intervened in this action as a defendant. The plaintiffs seek a declaration that the Town's bylaw amendment prohibiting owners of individual condominium units from recovering possession of their units from tenants under certain conditions is unconstitutional as being a violation of their Fifth and Fourteenth Amendment rights, and an injunction against the enforcement of the bylaw amendment by the Town or its agents or employees. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343(3).

The bylaw amendment (the so-called Ban Amendment) and its predecessors were discussed by the court in the case of *Chan v. Town of Brookline*, 484 F.Supp. 1283 (D.Mass.1980), wherein the court denied preliminary injunctive relief against the Town with respect to plaintiffs who had purchased their condominium prior to the Ban Amendment's enactment by the Town. The present action was consolidated with the *Chan* case in November, 1980. Before reaching the issue of the constitutionality of the Ban Amendment with respect to the Chans, the *Chan* action was dismissed for mootness in December, 1980, as the tenant occupying the Chans' unit voluntarily vacated the premises. Consequently, the court is not called upon in the instant case to decide the constitutionality of the ordinance as applied to persons who purchased their units with the intent to occupy them in accordance with then applicable eviction

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procedures (the Six Plus Six Amendment), but who may be subject to a permanent prohibition against evicting tenants in possession by the subsequent enactment of the Ban Amendment.

The gist of the Ban Amendment, amending section 9(a)(8) of Article XXXVIII of the Town bylaws (Rent and Eviction Control Bylaw), is that the owner of an individual condominium unit is precluded from recovering possession of his unit from a tenant who has occupied it continuously since the time before the recording of the master condominium deed.[1] The tenant has the equivalent of a life tenancy in the property so long as the amendment is in effect, and the owner may only recover possession for the use and occupancy of himself or other family members designated in the bylaw provision upon a tenant's voluntary departure or death. The Ban Amendment was approved at a town meeting on May 7, 1979. It was enacted as part of the Town's Rent and Eviction Control Bylaw and applies only to controlled rental units as defined in section 3(b) of Article XXXVIII. The amendment became effective after approval by the Attorney General for the Commonwealth of Massachusetts on August 13, 1979.

There is no dispute among the parties as to the facts relating to the Loetermans' purchase of the condominium and its occupancy by a tenant at the time of sale. The plaintiffs entered into a purchase and sale agreement on March 29, 1979 to purchase the unit for $35,000 in a rent controlled building for the purpose of occupying it as their personal residence. They took title to the unit on May 17, 1979, ten days after the Ban Amendment was passed at the Brookline town meeting. Plaintiffs do not dispute that they knew of the enactment of the amendment at the time they took title to their unit. At the time of sale the unit was, and continues to be occupied by a tenant who has lived there continuously since a time prior to the recording of the master condominium deed. Plaintiffs still desire to occupy the unit for dwelling purposes. The tenant, however, has refused to vacate the premises voluntarily.

Section 6 of the bylaw provides that the rents established for controlled rental units shall be adjusted "to assure that rents . . . are established at levels which yield to landlords a fair net operating income for such units." Prior to November 27, 1979, the tenant occupying the Loetermans' unit paid

1. The amendment was enacted as follows:

WHEREAS a serious public emergency with respect to a substantial and increasing shortage of rental housing accommodations, as declared in Chapter 843 of the Acts of 1970 and Article XXXVIII of the Brookline Bylaws, continues to confront the Town and its citizens, threatening the public health, safety, and welfare of its citizens, particularly families of low and moderate incomes and elderly persons on fixed incomes;

WHEREAS a rapid and increasing rate of conversion of rental housing to condominium ownership is exacerbating this shortage and creating severe hardship to rental housing occupants by reducing the supply of rental housing and raising the cost of housing so converted;

WHEREAS the loss of rental housing because of conversion to condominium ownership has created and will continue to aggravate the problems of housing its citizens, particularly families of low and moderate incomes and elderly persons on fixed incomes; and

WHEREAS the Town, after preliminary investigation of the issues, has appropriated a sum of money for an outside professional study of the effects of condominium conversion;

NOW, THEREFORE, Article XXXVIII of the Brookline Bylaws is hereby amended for the purpose of obtaining relief from the aforesaid conditions so that there is time for the community to study and consider long term solutions for this housing problem, as follows:

By amending paragraph (8) of Section 9(a), striking out the existing language and inserting in place thereof the following:

"(8) the landlord seeks to recover possession in good faith for use and occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law, except that no action shall be brought under this paragraph to recover possession of a condominium unit from a tenant who has occupied the unit continuously since a time prior to the recording of any master deed for the condominium;"

upon the condition that in the event this amendment is determined to be invalid, for any reason, the existing provision of paragraph (8) of said Section 9(a), which is amended hereby, shall continue in full force and effect.

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a monthly rent of $315.00. On November 21, 1979, plaintiffs were granted a rent increase by the Brookline Rent Control Board of $96.00 per month, raising the monthly maximum rent to $411.00. Thereafter, on June 30, 1981, plaintiffs received a rent increase of $110.00 per month, increasing the monthly maximum rent to $521.00.

The plaintiffs argue that the amendment unlawfully effects a redistribution of property [illegible] transferring from the owner to the tenant the right to use the property in a particular way for a public purpose. *See South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646, 679 (1st Cir. 1974). They do not dispute the existence of an increasing shortage of rental housing accommodations in the Town, exacerbated by a rapid and an increasing rate of conversion of rental units to condominiums, or that such a rental housing shortage poses a threat to the public health, safety, and welfare, particularly that of the elderly and low income households.[2] The thrust of their opposition to the Ban Amendment is that the amendment, unlike its predecessor, the "Six Plus Six" Amendment, effectively prohibits an owner from ever occupying his unit and that such a prohibition constitutes a "taking" of property violative of the Fifth and Fourteenth Amendments. According to plaintiffs, the fact that the Ban Amendment may operate to extinguish an owner's right of possession altogether distinguishes the present case from other cases where courts have upheld the government's right to prohibit particular uses of property, but where the owner nevertheless remains in possession or retains the right to use and occupy the premises he owns. Plaintiffs further urge that the Town's grant to the tenant of a right to occupy the premises indefinitely compels a property owner to dedicate his property indefinitely to the rental market, a practice held unlawful in another context in *Rivera v. R. Cobian Chinea and Co.*, 181 F.2d 974 (1st Cir. 1950).

The defendants and defendant-intervenor respond that the Ban Amendment does not operate as a taking of property in that the bylaw serves a legitimate public purpose of assuring an adequate supply of rental housing and allows purchasers of individual condominium units the right to receive rent and enjoy all other traditional incidents of ownership except occupancy. It is argued that a prohibition of only one use does not render plaintiffs' property worthless so as to amount to a taking requiring compensation. Defendants also contend that the plaintiffs here, as distinguished from the property owner in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), had no legitimate investment-backed expectation that has been thwarted by the Town. In this regard defendants focus upon the chronology of events surrounding the Loetermans' purchase of their unit.

[1] The Fifth Amendment's prohibition against the taking of private property for a public purpose is applicable against a state and its political subdivisions through the Fourteenth Amendment. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). Recent "takings" cases indicate that there is no set formula for determining when governmental action results in a taking; rather, the particular circumstances in each case must be examined. *Kaiser Aetna v. United States*, 444 U.S. 164, 165, 100 S.Ct. 383, 385, 62 L.Ed.2d 332 (1979); *Penn Central Transportation Co. v. New York City*, *supra*, 438 U.S., at 124, 98 S.Ct. at 2659. Generally, "taking" analysis requires a weighing of private and public interests, as all governmental regulation by definition involves some curtailment of private rights to promote a public purpose. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979).

2. For a discussion of the legislative response elsewhere to the effects of condominium conversion, see Snyderman & Morrison, *Rental Market Protection Through the Conversion Moratorium: Legal Limits and Alternatives*, 29 DePaul L.Rev. 973 (1980); Schlein, *Government Regulation of Condominium Conversion*, 8 B.C.Env.Aff.L.Rev. 919 (1980); Comment, *The Condominium Conversion Problems: Causes and Solutions*, Duke L.J. 305 (1980).

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[2] *Penn Central Transportation Co. v. New York City* dictates that the court must scrutinize the character of the action and the nature and extent of the interference, both physical and economic, with rights "in the parcel as a whole". 438 U.S. at 130–131, 98 S.Ct. at 2662–2663. In connection with the court's assessment of the economic impact of the regulation at issue, attention is to be paid to the extent to which the regulation has interfered with the property owner's distinct investment-backed *expectations*. *Id.* at 124, 98 S.Ct. at 2659. *See Kaiser Aetna v. United States, supra*, 444 U.S., at 179–180, 100 S.Ct. at 392–393. The government need not compensate a person for denying him the right to use that which he has never owned. *Flynn v. City of Cambridge*, — Mass. —, 418 N.E.2d 335, 339 (1981).

[3] The private interest asserted by the Loetermans is the right to use and occupy premises to which they lawfully took title and the correlative right to exclude others. The right to exclude has been recognized as an important element of private property ownership. *Kaiser Aetna v. United States, supra*, 444 U.S., at 179–180, 100 S.Ct. at 392–393. An examination of the facts in this case, however, leads me to conclude that this right is not compensable under the Fifth and Fourteenth Amendments. First of all, the Loetermans had no legitimate *expectation* of occupying their condominium unit at the time they purchased it. While the Loetermans entered into the purchase and sale agreement for the condominium unit before the Town enacted the Ban Amendment, the actual purchase of the property occurred ten days after the Amendment was passed at the Brookline town meeting. Plaintiffs, therefore, were on notice that they would not be able to evict the tenant occupying the unit and presumably knew or should have known that the continued use of their unit for rental housing was mandated by the Ban Amendment. Under these circumstances they had no legitimate expectation of occupying the unit themselves. While in some instances a transfer from an owner to another person of particular use of property might be viewed as a taking compensable under the Fifth and Fourteenth Amendments, *see South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646, 679 (1st Cir. 1974), the facts do not support such a conclusion in the present action.

In connection with the Loetermans' argument that the Ban Amendment goes "too far" in restricting a well recognized element of private property ownership by preventing occupancy of the premises by the owners themselves, the court finds it significant that the Ban Amendment does not operate to deny the Loetermans an economically viable and reasonable use of their property. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). Under the applicable rent control bylaws, plaintiffs here are entitled to a fair net operating income from their unit and retain other economic benefits ordinarily associated with the ownership of rental property. I am thus not persuaded that the Ban Amendment goes too far in restricting the owners' use of their property, particularly where there is no question that the amendment serves a legitimate public purpose of slowing the rate of reduction of rental housing accommodations in Brookline pending the Town's further study of the problem in consideration of long-range solutions to the increasing shortage of rental housing. While the Ban Amendment undeniably affects the present and future value of plaintiffs' property, I am not persuaded that the amendment unduly interferes with plaintiffs' rights so as to amount to a taking of property without just compensation.

Plaintiffs contend that the permanent nature of the Ban Amendment renders it confiscatory. In contrast to the "Six Plus Six" Amendment which preceded it and permitted evictions after a 12-month period, the current regulation has the potential for effecting a prohibition against occupancy by owners for the lifetime of the current tenant, a lifetime which in some instances may extend beyond that of the owners. The possibility remains that the amendment will not remain effective permanently, as its

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necessity is premised upon the existence of a shortage of rental housing and the need to study the problem further and develop long-term solutions to the problem. If conditions change or the Town develops alternative means to meet the crisis, the Town may choose to revoke the amendment.[3] Whether or not such an eventuality comes to pass, the permanence of the prohibition against evicting the tenants designated in the bylaw does not render the amendment unconstitutional as applied to the Loeterman's. As I have already concluded, they have no legitimate claim of a right to occupy the premises which the Town has denied since they knew that such a use would be forbidden at the time they purchased the property. For the duration of their ownership, moreover, they retain the right to use their property in an economically viable manner. Their rights in the property as a whole are not so substantially curtailed that a temporary or even permanent prohibition against their occupancy of the premises may be considered a compensable taking.

Accordingly, summary judgment is hereby entered in favor of the defendants, and plaintiffs' motion for summary judgment is denied.



3. As discussed in *Newell v. Rent Control Board of Peabody*, 378 Mass. 443, 392 N.E.2d 837, 840 (1979), the continuing existence of the emergency on which legislation which interferes with private property rights is founded might also be the subject to further consideration by the courts.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BEN LOETERMAN, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION
	)	No. 80-670-MC
TOWN OF BROOKLINE, ET AL., Defendants	)	

JUDGMENT

November 6, 1981

Mc NAUGHT, D.J.

In accordance with the Memorandum and Order of this date, judgement is hereby entered for the defendants without interest or costs.

John J. McNaught
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

5th Amendment to the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment to the United States Constitution.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions of Article XXXVIII of the Brookline By-Laws before passage of the Ban Amendment:

Section 9. Evictions.

(a) No person shall bring any action to recover possession of a controlled rental unit unless:

(8) The landlord seeks to recover possession in good faith for use and occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law, except that if the unit is a condominium unit occupied by a tenant who was in possession thereof at the time the landlord acquired ownership, then the Board shall

not issue a certificate of eviction hereunder for a period of six months from the date when the Board determines that the facts attested to in the landlord's petition are valid and in compliance herewith; and if the Board determines that a hardship exists, then the Board may extend the period between the determination of validity and compliance hereunder and the date of issuance of the certificate for an additional period of up to six months.

Ban Amendment

The amendment was enacted as follows:

WHEREAS a serious public emergency with respect to a substantial and increasing shortage of rental housing accommodations, as declared in Chapter 843 of the Acts of 1970 and Article XXXVIII of the Brookline Bylaws, continues to confront the Town and its citizens, threatening the public health, safety, and welfare of

its citizens, particularly families of low and moderate incomes and elderly persons on fixed incomes;

WHEREAS a rapid and increasing rate of conversion of rental housing to condominium ownership is exacerbating this shortage and causing severe hardship to rental housing occupants by reducing the supply of rental housing and raising the cost of housing so converted;

WHEREAS the loss of rental housing because of conversion to condominium ownership has created and will continue to aggravate the problems of housing its citizens particularly families of low and moderate incomes and elderly persons on fixed incomes; and

WHEREAS the Town, after preliminary investigation of the issues, has appropriated a sum of money for an outside professional study of the effects of condominium conversion;

NOW, THEREFORE, Article XXXVIII of the Brookline Bylaws is hereby amended for the purpose of obtaining relief from the aforesaid conditions so that there is time for the community to study and consider long term solutions for this housing problem, as follows:

By amending paragraph (8) of Section 9(a), striking out the existing language and inserting in place thereof the following:

"(8) the landlord seeks to recover possession in good faith for use and occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law or daughter-in-law, except that no action shall be brought under this paragraph to recover possession of a condominium unit from a tenant who has occupied the unit continuously since a time prior to the recording of any master deed for the condominium;"

upon the condition that in the event this amendment is determined to be invalid, for any reason, the existing

provision of paragraph (8) of said Section 9(a), which is amended hereby, shall continue in full force and effect.

Appendix

NO. 81-1447

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

Ben Loeterman and Mardi Loeterman,

Petitioners

v.

Town of Brookline and
Rent Control Board of Brookline,

Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS BEFORE JUDGMENT

APPENDIX

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JUDGMENT A24

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED A25

Ben LOETERMAN, et al., Plaintiffs,

v.

TOWN OF BROOKLINE, et al.,
Defendants

Civ. A. No. 80-670-MC.

United States District Court,
D. Massachusetts.

Nov. 6, 1981.

Condominium unit purchasers brought action against town and town rent control board seeking declaration that certain town bylaw amendment was unconstitutional under Fifth and Fourteenth Amendments and for injunction against enforcement of bylaw amendment. The District Court, McNaught, J., held that amendment, providing that owner of individual condominium unit was precluded from recovering possession of unit from tenant who occupied unit continuously since time before recording of master condominium deed, was not unconstitutional "taking"

as applied to purchasers of condominium unit.

Summary judgment in favor of defendants.

1. Eminent Domain 2(1)

Generally, analysis whether governmental action results in a taking of private property violative of the Fifth Amendment requires weighing of private and public interest, as all governmental regulation by definition involves some curtailment of private rights to promote a public purpose. U.S.C.A.Const.Amends. 5, 14.

2. Eminent Domain 2(1)

In connection with court's assessment of economic impact of regulation at issue which allegedly constitutes governmental taking of private property in violation of Fifth Amendment, attention is to be paid to extent to which regulation has interfered

with property owner's distinct investment-backed expectations, and government need not compensate person for denying him right to use that which he has never owned. U.S.C.A.Const.Amends. 5, 14.

3. Eminent Domain 2(1.1)

Town bylaw amendment, providing that owner of individual condominium unit was precluded from recovering possession of unit from tenant who occupied unit continuously since time before recording of master condominium deed, was not unconstitutional "taking" as applied to purchasers of condominium unit where, while purchasers entered into purchase and sale agreement from unit before town enacted amendment, actual purchase of property occurred ten days after amendment was passed and, under applicable rent control bylaws, purchasers were entitled to fair net

operating income from their unit and retained other economic benefits ordinarily associated with ownership of rental property. U.S.C.A.Const.Amends. 5, 14.

Philip S. Lapatin, Gaston, Snow & Ely Bartlett, Mitchel S. Ross, Bernkopf, Goodman & Baseman, Boston, Mass., for plaintiffs.

David Lee Turner, Janet B. Fierman, Cathleen C. Cavell, Brookline, Mass., for Town of Brookline.

Roger R. Lipson, Brookline, Mass., for Rent Control Bd., Town of Brookline.

Gerald J. Caruso, Asst. Atty. Gen., Boston, Mass., for intervenor Atty. Gen. of Mass.

MEMORANDUM AND ORDER

McNAUGHT, District Judge.

This matter is before the court on the parties' cross motions for summary judgment. The plaintiffs are Ben and

Mardi Loeterman, purchasers of a condominium unit in Brookline, Massachusetts, and the defendants are the Town of Brookline (the Town) and the Rent Control Board of Brookline (Rent Control Board). The Attorney General of Massachusetts has also intervened in this action as a defendant. The plaintiffs seek a declaration that the Town's bylaw amendment prohibiting owners of individual condominium units from recovering possession of their units from tenants under certain conditions is unconstitutional as being a violation of their Fifth and Fourteenth Amendment rights, and an injunction against the enforcement of the bylaw amendment by the Town or its agents or employees. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343(3).

The bylaw amendment (the so-called Ban Amendment) and its predecessors were discussed by the court in the case of Chan v. Town of Brookline, 848 F.Supp. 1283(D.Mass.1980), wherein the court denied preliminary injunctive relief against the Town with respect to plaintiffs who had purchased their condominium prior to the Ban Amendment's enactment by the Town. The present action was consolidated with the Chan case in November, 1980. Before reaching the issue of the constitutionality of the Ban Amendment with respect to the Chans, the Chan action was dismissed for mootness in December, 1980, as the tenant occupying the Chans' unit voluntarily vacated the premises. Consequently, the court is not called upon in the instant case to decide the constitutionality of the ordinance as applied to persons who

purchased their units with the intent to occupy them in accordance with then applicable eviction procedures (the Six Plus Six Amendment), but who may be subject to a permanent prohibition against evicting tenants in possession by the subsequent enactment of the Ban Amendment.

The gist of the Ban Amendment, amending section 9(a)(8) of Article XXXVIII of the Town bylaws (Rent and Eviction Control Bylaw), is that the owner of an individual condominium unit is precluded from recovering possession of his unit from a tenant who has occupied it continuously since the time before the recording of the master condominium deed.[1] The tenant has the

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1. The amendment was enacted as follows:

WHEREAS a serious public emergency with respect to a substantial and increasing shortage of rental housing accommodations, as declared in Chapter 843 of the

equivalent of a life tenancy in the property so long as the amendment is in

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Acts of 1970 and Article XXXVIII of the Brookline Bylaws, continues to confront the Town and its citizens, threatening the public health, safety, and welfare of its citizens, particularly families of low and moderate incomes and elderly persons on fixed incomes;

WHEREAS a rapid and increasing rate of conversion of rental housing to condominium ownership is exacerbating this shortage and causing severe hardship to rental housing occupants by reducing the supply of rental housing and raising the cost of housing so converted;

WHEREAS the loss of rental housing because of conversion to condominium ownership has created and will continue to aggravate the problems of housing its citizens, particularly families of low and moderate incomes and elderly persons on fixed incomes; and

WHEREAS the Town, after preliminary investigation of the issues, has appropriated a sum of money for an outside professional study of the effects of condominium conversion;

NOW, THEREFORE, Article XXXVIII of the Brookline Bylaws is hereby amended for the purpose of obtaining relief from the aforesaid conditions so that there is time for the community to study and consider long term solutions for this housing problem, as follows:

By amending paragraph (8) of Section 9(a), striking out the existing language and inserting in place thereof the following:

"(8) the landlord seeks to recover possession in good faith for use and

effect, and the owner may only recover possession for the use and occupancy of himself of other family members designated in the bylaw provision upon a tenant's voluntary departure or death. The Ban Amendment was approved at a town meeting on May 7, 1979. It was enacted as part of the Town's Rent and Eviction Control Bylaw and applies only to controlled rental units as defined in section 3(b) of

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occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law, except that no action shall be brought under this paragraph to recover possession of a condominium unit from a tenant who has occupied the unit continuously since a time prior to the recording of an master deed for the condominium;"
upon the condition that in the event this amendment is determined to be invalid, for any reason, the existing provision of paragraph (8) of said Section 9(a), which is amended hereby, shall continue in full force and effect.

Article XXXVIII. The amendment became effective after approval by the Attorney General for the Commonwealth of Massachusetts on August 14, 1979.

There is no dispute among the parties as to the facts relating to the Loetermans' purchase of the condominium and its occupancy by a tenant at the time of sale. The plaintiffs entered into a purchase and sale agreement on March 29, 1979 to purchase the unit for $35,000 in a rent controlled building for the purpose of occupying it as their personal residence. They took title to the unit on May 17, 1979, ten days after the Ban amendment was passed at the Brookline town meeting. Plaintiffs do not dispute that they knew of the enactment of the amendment at the time they took title to their unit. At the time of sale

the unit was, and continues to be occupied by a tenant who has lived there continuously since a time prior to the recording of the master condominium deed. Plaintiffs still desire to occupy the unit for dwelling purposes. The tenant, however, has refused to vacate the premises voluntarily.

Section 6 of the bylaw provides that the rents established for controlled rental units shall be adjusted "to assure that rents...are established at levels which yield to landlords a fair net operating income for such units." Prior to November 27, 1979, the tenant occupying the Loetermans' unit paid a monthly rent of $315.00. On November 27, 1979, plaintiffs were granted a rent increase by the Brookline Rent Control Board of $96.00 per month, raising the monthly maximum rent to

$411.00. Thereafter, on June 30, 1981, plaintiffs received a rent increase of $110.00 per month, increasing the monthly maximum rent to $521.00.

The plaintiffs argue that the amendment unlawfully effects a redistribution of property by transferring from the owner to the tenant the right to use the property in a particular way for a public purpose. See South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 679 (1st Cir. 1974). They do not dispute the existence of an increasing shortage of rental housing acommodations in the Town, exacerbated by a rapid and an increasing rate of conversion of rental units to condominiums, or that such a rental housing shortage poses a threat to the public health, safety, and welfare, particularly that of the elderly and low

income households.[2] The thrust of their opposition to the Ban Amendment is that the amendment, unlike its predecessor, the "Six Plus Six" Amendment, effectively prohibits an owner from ever occupying his unit and that such a prohibition constitutes a "taking" of property violative of the Fifth and Fourteenth Amendments. According to plaintiffs, the fact that the Ban Amendment may operate to extinguish an owner's right of possession altogether distinguishes the present case from other cases where courts have upheld the government's right

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2. For a discussion of the legislative response elsewhere to the effects of condominium conversion, see Snyderman & Morrison, Rental Market Protection Through the Conversion Moratorium: Legal Limits and Alternatives, 29 DePaul L.Rev. 973 (1980); Schlein, Government Regulation of Condominium Conversion, 8 B.C.Env.Aff.L.Rev. 919 (1980); Comment, The Condominium Conversion Problems: Causes and Solutions, Duke L.J. 306 (1980).

to prohibit particular uses of property, but where the owner nevertheless remains in possession or retains the right to use and occupy the premises he owns. Plaintiffs further urge that the Town's grant to the tenant of a right to occupy the premises indefinitely compels a property owner to dedicate his property indefinitely to the rental market, a practice held unlawful in another context in Rivera v. R. Cobian Chinea and Co., 181 F.2d 974 (1st Cir. 1950).

The defendants and defendant-intervenor respond that the Ban Amendment does not operate as a taking of property in that the bylaw serves a legitimate public purpose of assuring an adequate supply of rental housing and allows purchasers of individual condominium units the right to receive rent and enjoy all other traditional incidents of

ownership except occupancy. It is argued that a prohibition of only one use does not render plaintiffs' property worthless so as to amount to a taking requiring compensation. Defendants also contend that the plaintiffs here, as distinguished from the property owner in Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), had no legitimate investment-backed expectation that has been thwarted by the Town. In this regard defendants focus upon the chronology of events surrounding the Loetermans' purchase of their unit.

[1] The Fifth Amendment's pronibition against the taking of private property for a public purpose is applicable against a state and its political subdivisions through the Fourteenth Amendment. Penn Central

Transportation Co. v. New York City, 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). Recent "takings" cases indicate that there is no set formula for determining when governmental action results in a taking; rather, the particular circumstances in each case must be examined. Kaiser Aetna v. United States, 444 U.S. 164, 165, 100 S.Ct. 383, 385, 62 L.Ed.2d 332 (1979); Penn Central Transportation Co. v. New York City, supra, 438 U.S., at 124, 98, S.Ct. at 2659. Generally, "taking" analysis requires a weighing of a private and public interests, as all governmental regulation by definition involves some curtailment of private rights to promote a public purpose. Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); Andrus v. Allard, 444 U.S. 51, 65, 100 S.Ct.

318, 326, 62 L.Ed.2d 210 (1979).

[2] Penn Central Transportation Co. v. New York City dictates that the court must scrutinize the character of the action and the nature and extent of the interference, both physical and economic, with rights "in the parcel as a whole". 438 U.S. at 130-131, 98 S.Ct. at 2662-2663. In connection with the court's assessment of the economic impact of the regulation at issue, attention is to be paid to the extent to which the regulation has interfered with the property owner's distinct investment-backed expectations. Id. at 124, 98 S.Ct. at 2659. See Kaiser Aetna v. United States, supra, 444 U.S., at 179-180, 100 S.Ct. at 392-393. The government need not compensate a person for denying him the right to use that which he has never owned. Flynn v. City

of Cambridge, __ Mass. __, 418 N.E.2d 335, 339 (1981).

[3] The private interest asserted by the Loetermans is the right to use and occupy premises to which they lawfully took title and the correlative right to exclude others. The right to exclude has been recognized as an important element of private property ownership. Kaiser Aetna v. United States, supra, 444 U.S., at 179-180, 100 S.Ct. at 392-393. An examination of the facts in this case, however, leads me to conclude that this right is not compensable under the Fifth and Fouteenth Amendments. First of all, the Loetermans had no legitimate expectation of occupying their condominium at the time they purchased it. While the Loetermans entered into the purchase and sale agreement for the condominium unit before the Town enacted

the Ban Amendment, the actual purchase of the property occurred ten days after the amendment was passed at the Brookline town meeting. Plaintiffs, theefore, were on notice that they would not be able to evict the tenant occupying the unit and reasonably knew or should have known that the continued use of their unit for rental housing was mandated by the Ban Amendment. Under these circumstances they had no legitimate expectation of occupying the unit themselves. While in some instances a transfer from an owner to another person of a particular use of property might be viewed as a taking compensable under the Fifth and Fourteenth Amendments, see South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 679 (1st Cir. 1974), the facts do not support such a conclusion in the present action.

In connection with the Loetermans' argument that the Ban Amendment goes "too far" in restricting a well recognized element of private property ownership by preventing occupancy of the premises by the owners themselves, the court finds it significant that the Ban Amendment does not operate to deny the Loetermans an economically viable and reasonable use of their property. See Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 21378, 2141, 65 L.Ed.2d 106 (1980). Under the applicable rent control bylaws, plaintiffs here are entitled to a fair net operating income from their unit and retain other economic benefits ordinarily associated with the ownership of rental property. I am thus not persuaded that the Ban Amendment goes too far in restricting the owners' use of their property, particularly where there is no

question that the amendment serves a legitimate public purpose of slowing the rate of reduction of rental housing accommodations in Brookline pending the Town's further study of the problem in consideration of long-range solutions to the increasing shortage of rental housing. While the Ban Amendment undeniably affects the present and future value of plaintiffs' property, I am not persuaded that the amendment unduly interferes with plaintiffs' rights so as to amount to a taking of property without just compensation.

Plaintiffs contend that the permanent nature of the Ban Amendment renders it confiscatory. In contrast to the "Six Plus Six" Amendment which preceded it and permitted evictions after a 12-month period, the current regulation has the potential for effecting a

prohibition against occupancy by owners for the lifetime of the current tenant, a lifetime which in some instances may extend beyond that of the owners. The possibility remains that the amendment will not remain effective permanently, as its necessity is premised upon the existence of a shortage of rental housing and the need to study the problem further and develop longterm solutions to the problem. If conditions change or the Town develops alternative means to meet the crisis, the Town may choose to revoke the amendment.[3] Whether or not such an eventuality comes to pass, the permanence of the prohibition against evicting the

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3. As discussed in Newell v. Rent Control Board of Peabody, 378 Mass. 443, 392 N.E.2d 837, 840 (1979), the continuing existence of the emergency on which legislation which interferes with private rights is founded might also be the subject to further consideration by the courts.

tenants designated in the bylaw does not render the amendment unconstitutional as applied to the Loetermans. As I have already concluded, they have no legitimate claim of a right to occupy the premises which the Town has denied since they knew that such a use would be forbidden at the time they purchased the property. For the duration of their ownership, moreover, they retain the right to use their property in an economically viable manner. Their rights in the property as a whole are not so substantially curtailed that a temporary or even permanent prohibition against their occupancy of the premises may be considered a compensable taking.

Accordingly, summary judgment is hereby entered in favor of the defendants, and plaintiffs' motion for summary judgment is denied.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BEN LOETERMAN, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION No. 80-670-MC
TOWN OF BROOKLINE, ET AL., Defendants	)	

JUDGMENT

November 6, 1981

McNAUGHT, D.J.

In accordance with the memorandum and Order of this date, judgment is hereby entered for the defendants without interest or costs.

/s/ John J. McNaught
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

5th Amendment to the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment to the United States Constitution.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions of Article XXXVIII of the Brookline By-Laws before passage of the Ban Amendment:

Section 9. Evictions.

(a) No person shall bring any action to recover possession of a controlled rental unit unless:

(8) The landlord seeks to recover possession in good faith for use and occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law, except that if the unit is a condominium unit occupied by a tenant who was in possession thereof at the time the landlord acquired ownership, then the Board shall

not issue a certificate of eviction hereunder for a period of six months from the date when the Board determines that the facts attested to in the landlord's petition are valid and in compliance herewith; and if the Board determines that a hardship exists, then the Board may extend the period between the determination of validity and compliance hereunder and the date of issuance of the certificate for an additional period of up to six months.

Ban Amendment

The amendment was enacted as follows:

WHEREAS a serious public emergency with respect to a substantial and increasing shortage of rental housing accommodations, as declared in Chapter 843 of the Acts of 1970 and Article XXXVIII of the Brookline Bylaws, continues to confront the Town and its citizens, threatening the public health, safety, and welfare of

its citizens, particularly families of low and moderate incomes and elderly persons on fixed incomes;

WHEREAS a rapid and increasing rate of conversion of rental housing to condominium ownership is exacerbating this shortage and causing severe hardship to rental housing occupants by reducing the supply of rental housing and raising the cost of housing so converted;

WHEREAS the loss of rental housing because of conversion to condominium ownership has created and will continue to aggravate the problems of housing its citizens particularly families of low and moderate incomes and elderly persons on fixed incomes; and

WHEREAS the Town, after preliminary investigation of the issues, has appropriated a sum of money for an outside professional study of the effects of condominium conversion;

NOW, THEREFORE, Article XXXVIII of the Brookline Bylaws is hereby amended for the purpose of obtaining relief from the aforesaid conditions so that there is time for the community to study and consider long term solutions for this housing problem, as follows:

By amending paragraph (8) of Section 9(a), striking out the existing language and inserting in place thereof the following:

"(8) the landlord seeks to recover possession in good faith for use and occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law or daughter-in-law, except that no action shall be brought under this paragraph to recover possession of a condominium unit from a tenant who has occupied the unit continuously since a time prior to the recording of any master deed for the condominium;"

upon the condition that in the event this amendment is determined to be invalid, for any reason, the existing

provision of paragraph (8) of said Section 9(a), which is amended hereby, shall continue in full force and effect.

Opposition

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No. 81-1447

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BEN LOETERMAN AND MARDI LOETERMAN,

Petitioners,

v.

TOWN OF BROOKLINE, the RENT CONTROL BOARD OF BROOKLINE and the ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT BEFORE JUDGMENT.

RESPONDENT ATTORNEY GENERAL'S BRIEF IN OPPOSITION

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No. 81-1447

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BEN LOETERMAN AND MARDI LOETERMAN,

Petitioners,

v.

TOWN OF BROOKLINE, the RENT CONTROL BOARD OF BROOKLINE and the ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT BEFORE JUDGMENT.

RESPONDENT ATTORNEY GENERAL'S BRIEF IN OPPOSITION

In accordance with Supreme Court Rule 22, the Attorney General of the Commonwealth of Massachusetts (Attorney General), defendant-intervenor in the

proceedings before the United States District Court for the District of Massachusetts, files this brief in opposition to the petition for a writ of certiorari to the First Circuit Court of Appeals before judgment.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, the Attorney General submits the following supplemental statement of facts. The Brookline by-law which is the subject of this action was enacted in response to "a substantial and increasing shortage of rental housing accommodations in the town of Brookline." App. 27.[1/] This shortage has been exacerbated by

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1/ The Attorney General shall refer to the Appendix as App. ___. The Petition shall be referred to as Pet. ___.

the conversion of rental housing to condominiums. App. 28. Initially, the by-law permitted condominium purchasers to evict the tenants who were occupying a converted rental unit, but delayed the eviction for six-months. App. 7. This six-month period could, however, be extended for an additional six months if the Brookline Rent Control Board found hardship on the part of the tenant threatened with eviction.[2/] Following the adoption of this "six-plus-six"

2/ The by-law has always applied only to rental units which were subject to rent control at the time of conversion. App. 9. The history of the by-law is set forth in an opinion of the Massachusetts Supreme Judicial Court, Grace v. Town of Brookline, 1979 Mass. Adv. Sh. 2257, 399 N.E.2d 1038 (1979), and an earlier opinion of the District Court, Chan v. Town of Brookline, 484 F.Supp. 1283 (D.Mass. 1980).

provision, Brookline appropriated funds on May 7, 1979 for a professional consultant to study the effects of condominium conversion upon the town. App. 21.[3/] At the same time, Brookline amended its by-law to the present version. App. 9. The amendment prohibits evictions from rent-controlled units which have been converted to condominiums if the tenant has continuously occupied the unit prior to the recording of the master condominium deed. App. 7.[4/] The amendment is designed to preserve a sufficient amount of rental housing in

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3/ The purpose of the study was to develop long-range solutions to the increasing shortage of rental housing. App. 21.

4/ The owner may recover possession of the condominium upon the tenant's voluntary departure or death. App. 9.

Brookline and to stabilize the severe housing shortage which has been exacerbated by condominium conversions. App. 12.[5/] Although the by-law prohibits condominium owners from evicting tenants upon the conversion of the property, it does allow those owners to receive an amount of rent which will yield a "fair net operating income" for the duration of the tenancy. App. 11. The petitioners, Ben and Mardi Loeterman (the Loetermans), purchased their condominium unit on May 17, 1979. At the time of

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5/ The Loetermans do not dispute the existence of a shortage of rental housing in Brookline. App. 12. Nor do they dispute that this shortage has been exacerbated by condominium conversions. Id.

purchase, the Loetermans knew of the existance of the by-law and the ban on evictions. Pet. 4; App. 10. The Loetermans also knew that they would not be able to occupy the condominium since the unit was occupied by a tenant who had lived in the unit prior to the recording of the condominium master deed. Id. When they purchased the unit, the Loetermans were receiving a monthly rent of $315.00. App. 11. On November 27, 1979, they sought and received a rent increase of $96.00, raising the monthly rent paid by the tenant to $411.00. App. 11. Finally, on June 30, 1981, the Loetermans received a second rent increase of $110.00 per month, which brought the monthly rent to $521.00.

REASONS FOR DENYING THE WRIT

A. The Public Interest Does Not Call For A Deviation From Normal Appellate Procedure In This Case.

The Loetermans request the Court to deviate from normal appellate procedures and to grant their petition for a writ of certiorari prior to review by the First Circuit Court of Appeals. Pet. 6-8. This case does not warrant such extraordinary action. Unlike those few cases in which this Court has granted review prior to the entry of judgment in the Court of Appeals, this case does not present a question of great constitutional significance,[6/] or a question

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6/ Compare with Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Carter v. Carter Co., 298 U.S. 238 (1936).

of national importance.[7] This case presents the narrow issue whether the by-law has the effect of taking the Loetermans' property without just compensation under the peculiar facts existing in Brookline.[8]

As justification for their premature petition, the Loetermans assert that the Court has not, since 1921, established "definitive legal standards" for measuring the constitutionality of

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7/ Compare with United States v. Nixon, 418 U.S. 683, 686-687 (1974); United States v. United Mine Workers, 330 U.S. 258 (1947).

8/ Conspicuously absent from the Loetermans' petition is reference to other cities or towns which have enacted similar ordinances. The Brookline by-law is one town's unique way of handling its housing problems and does not typify the ordinances which have been enacted elsewhere to control condominium conversions.

municipal regulations in this area. Pet. 8. Such a claim does not, however, justify the exceptional review which the Loetermans request. The Court has purposely declined to codify a definitive formula for determining when a compensable taking has occurred. Pennsylvania Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978). The Court has instead "examined the 'taking' question by engaging in essentially ad hoc, factual inquiries." Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). The absence of "definitive legal standards" does not, therefore, warrant this Court's review before the entry of judgment in the Court of Appeals. Moreover, the absence of a definitive precedent militates in favor of review by

the Court of Appeals whose opinion would aid this Court in developing the standards to be applied in cases such as this.[9/]

B. The District Court Properly Determined That The By-Law Did Not Violate The Taking Clause Of The Fifth Amendment.

Apart from the Loetermans' failure to support their extraordinary request on the basis of sound policy arguments, the weakness of the Loetermans' legal claims also militates against direct review by this Court.

9/ It is ironic that the Loetermans seek to avoid the First Circuit since the cases upon which they relied most heavily in the district court were First Circuit cases. E.g., South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646 (1st Cir. 1974); Rivera v. R. Cobian Chinea, Co., 181 F.2d 974 (1st Cir. 1950).

The Brookline by-law cannot be characterized as the type of government invasion which amounts to a taking in violation of the Fifth Amendment. Rather, it is merely an interference which has arisen from "a public program adjusting the benefits and burdens of economic life to promote the public good." Pennsylvania Central Transportation Co., 438 U.S. at 124. "Although no precise rule determines when property has been taken . . . the question necessarily requires a weighing of private and public interests." Agins v. City of Tiburon, 447 U.S. 255, 261 (1980). After carefully balancing the burden placed upon the Loetermans and the benefit which Brookline achieves by its by-law, the district court properly determined that the by-law

was a valid exercise of the police power.10/

The Loetermans do not dispute the existence of an increasing shortage of rental housing in Brookline or the threat which that shortage poses to the public health, safety and welfare. App. 12. They also do not dispute that this housing shortage has been "exacerbated by a rapid and an increasing rate of conversion of rental units to condominiums." Id. The Court has previously recognized that the grief and harm which accompany the dislocation of people during housing shortages justify government action to

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10/ The district court's decision comports with other decisions which have reviewed ordinances restricting the evictions of tenants following condominium conversion. See Flynn v. City of Cambridge, 1981 Mass. Adv. Sh. 692, 418 N.E. 2d 335 (1981).

preserve existing rental units. Block v. Hirsh, 256 U.S. 135, 156 (1921). The by-law's purpose is unquestionably to preserve an adequate stock of rental housing in the town -- especially for the poor and elderly. App. 12. It does this by protecting tenants from the displacement which generally occurs following the conversion to condominiums. See 120 Cong. Rec. S. 32704 (1974).

The Loetermans claim that, since the by-law denies them the right to occupy their condominium, it takes their property without just compensation. However, simply because the by-law denies the Loetermans one traditional incident of ownership, i.e., occupancy, it need not be considered a taking. Andrus v.

Allard, 444 U.S. 51, 65 (1979). When the public welfare has warranted action, the "Court has upheld land use regulations that destroyed or adversely affected recognized real property interests," Pennsylvania Central Trans. Co., 438 U.S. at 125, or which have "restrict[ed] the owner's full exploitation of the property." Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 163 (1980). "At least where an owner possesses a full bundle of property rights, the destruction of 'one strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 U.S. 51, 65-66 (1979).[11/]

11/ Thus, restrictions upon the right to sell one's property, Andrus v. Allard, 444 U.S. 51 (1979), the right to use

(footnote continued)

The by-law does not deprive the Loetermans of all beneficial uses of their property; nor does it make their property worthless. The Loetermans retain all the benefits of property ownership and retain the substantial economic

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(footnote continued)

one's land in an otherwise lawful manner, Agins v. City of Tiburon, 447 U.S. 255, (1980), Goldblatt v. Town of Hampstead, 369 U.S. 590, 594 (1962), and the right to build upon one's property, Pennsylvania Central, 438 U.S. 125 (1978) (cases collected), Gorieb v. Fox, 274 U.S. 603, 608 (1927), have been held not to be takings. It is only when the right of ownership itself is denied, Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980), when the regulation makes the property worthless, Pennsylvania v. Mahon, 260 U.S. 393 (1922), or when the regulation frustrates a legitimate investment-backed expectation, Kaiser Aetna v. United States, 444 U.S. 164 (1979), that a taking occurs. As the district court found, the by-law has none of the effects of a taking.

advantages which flow from their investment. Over the last two years, the Loetermans have received substantial rent increases.12/

They also retain the tax advantages in the form of tax deductions associated with ownership of rental property.

Moreover, the Loetermans knew at the time they purchased the condominium that they would be unable to occupy the unit. Thus, they did not have such a reasonable expectation of occupying their condominium that justice and fairness would require compensation. Compare with Kaiser Aetna, 444 U.S. 164, 175 (1979).

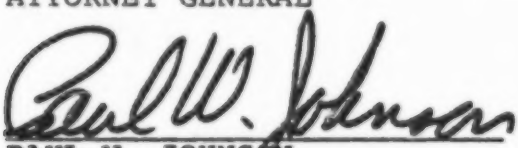
12/ The rent has been increased by sixty-five percent since the Loetermans purchased the unit. App. 11.

Under these circumstances, the by-law does not effect a taking of the Loetermans' property. The by-law concededly promotes the public health, safety and welfare while at the same time preserving a beneficial and economically viable use for the property owner. Therefore, the district court properly determined that the by-law did not violate the Fifth Amendment.

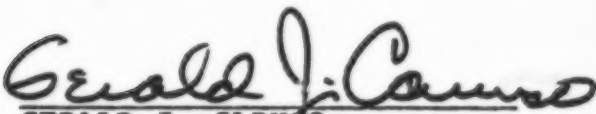
CONCLUSION

For the foregoing reasons, the Court should deny the Loeterman's Petition for Certiorari to the First Circuit Court of Appeals before judgment.

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Opposition

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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

BEN LOETERMAN AND MARDI LOETERMAN,

PETITIONERS,

v.

TOWN OF BROOKLINE

AND

RENT CONTROL BOARD OF BROOKLINE,

RESPONDENTS.

OPPOSITION TO PETITIONERS' "PETITION FOR CERTIORARI TO THE COURT OF APPEALS BEFORE JUDGMENT"

BRIEF FOR TOWN OF BROOKLINE AND RENT CONTROL BOARD OF BROOKLINE

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Question Presented

Did the district court below properly hold that the Town of Brookline's by-law, regulating conversion of rental units to condominiums, did not effect an unconstitutional taking of the petitioner's property?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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OPPOSITION TO PETITIONERS'
"PETITION FOR CERTIORARI
TO THE COURT OF APPEALS BEFORE JUDGMENT"

BRIEF FOR TOWN OF BROOKLINE AND
RENT CONTROL BOARD OF BROOKLINE

Statement of the Case

The petitioners ("Loetermans") own a condominium in the respondent, Town of Brookline ("Town"), which previously had been a rental apartment and which they desire to use as their personal residence.

There is "an increasing shortage of rental housing accommodations in the Town, exacerbated by a rapid and an increasing rate of conversion of rental units to condominiums, [and] such rental housing shortage poses a threat to the public health, safety and welfare, particularly that of the elderly and low income households." Loeterman v. Town of Brookline, 524 F.Supp. 1325, 1328 (D. Mass 1981), reproduced in the Appendix, A 12-13.* The Town's rent control by-laws provide in pertinent part (hereinafter referred to as the "Ban Amendment") that an owner of a condominium unit cannot recover possession of the unit (for personal use or otherwise) from a tenant who has occupied the unit continuously since before the recording

*All references to the opinion of the District Court below shall be cited herein as they appear in the Appendix to the Petition for Certiorari Before Judgment as follows: A___.

of the master condominium deed. A 7. The Loeterman's unit is occupied by such a tenant and is subject to the Ban Amendment. A 10-11. The Loetermans purchased their condominium in May, 1979, after discussing the Ban Amendment and its effect on their unit with their attorney, and knowing that they could not personally occupy their unit until their tenant voluntarily departed or died. A 10-11.

The Town's rent control by-laws also provide that the Loetermans are entitled to receive rents for their condominium unit which yield them a fair net operating income. A 11. Since the Loetermans purchased their condominium in May, 1979 they have received two rent increases, so that their tenant's monthly rent has risen from $315.00 to $501.00. A 11-12.

In November, 1979, the Loetermans brought an action against the Town and its Rent Control Board in the U.S. District

Court for Massachusetts claiming that the Ban Amendment, by preventing them from personally occupying their condominium, effected an unconstitutional taking of their property. In November, 1981, that Court, applying settled case law precedents to the undisputed facts in this case, held that the Ban Amendment did not effect an unconstitutional taking of the Loeterman's property, and, accordingly, entered summary judgment in favor of the Town and its Rent Control Board. A 1-24. In December, 1981, the Loetermans filed a Notice of Appeal to the Court of Appeals for the First Circuit. In February, 1982, they filed in this Court a Petition for Certiorari before Judgment, invoking the jurisdiction of this Court under 28 U.S.C. §1254(1) and Rule 18 of the Rules of this Court.

Argument

THIS CASE IS NOT OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY DEVIATION FROM NORMAL APPELLATE PRACTICE AND REQUIRE IMMEDIATE SETTLEMENT IN THIS COURT.

Rule 18 of the Rules of this Court provides that this Court will grant a petition for certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and require immediate settlement in this Court." United States Supreme Court Rules, Rule 18. The rare cases in which this Court has granted a petition for certiorari before judgment involved extraordinary circumstances necessitating immediate resolution of new and important issues of law. See e.g. U.S. v. Nixon, 418 U.S. 683, 687 (1974) (extent of executive privilege of U.S. president subject to contempt proceedings); Wilson v. Girard, 354 U.S. 524 (1957)

(construction of U.S. - Japan Treaty terms to determine jurisdiction over U.S. citizen for trial purposes); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (legality of U.S. take-over by Executive Order of privately owned steel mills to avoid strike which would jeopardize national defense); U.S. v. United Mine Workers of America, 330 U.S. 258 (1947) (legality of actions by national union leaders shutting down U.S. mines); Ex Parte Quirin, 317 U.S. 1 (1942) (right of U.S. citizen, imprisoned and awaiting trial by Military Commission in wartime, to civilian trial).

The case at hand does not involve novel questions of law. Rather, it involves the application of an established body of law ("takings" law) to a new fact situation (condominium conversions). The law of "takings" cases, as set forth in recent decisions of this Court, requires

examination of the particular circumstances of each case, and application of a "takings" analysis to those circumstances. The "takings" analysis, clearly outlined in this Court's decisions, involves judicial scrutiny of the nature and extent to which a government regulation interferes with a property owner's rights in his property as a whole, and particularly, of its interference with the property owner's investment-backed expectations in his property. Loeterman v. Brookline, A 16-17 citing Kaiser Aetna v. U.S., 444 U.S. 164, 179-180 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130 (1978).

The District Court below applied just such an analysis to the undisputed facts in this case and found that the Loetermans had no legitimate expectation of occupying their condominium when they

purchased it, that they retained the right to use the property in an economically viable manner, and therefore that the Ban Amendment did not effect an unconstitutional taking of their property. The Loetermans have appealed from that decision to the First Circuit Court of Appeals, which has the authority and ability to review the District Court's taking analysis and application of that analysis to the Loeterman's fact situation. The law in this case, hence, is not so new or unclear that deviation from normal appellate practice is warranted.

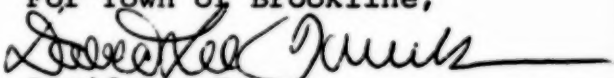
Moreover, no imperative public interest requires immediate settlement of the issue in this case by this Court. The case does not involve the national defense or security, government or official authority, political or social stability, or any other paramount concern of the

public at large. Indeed, settlement of the issue in this case has already been pending for almost three years. Thus the case is not of such imperative importance that deviation from the normal appellate practice is warranted.

Conclusion

For these reasons, the respondents, Town of Brookline and Rent Control Board of Brookline oppose the Loetermans' Petition For Certiorari Before Judgment In the Appeals Court and respectfully request that this Court deny that Petition so that this case may follow the normal appellate procedure.

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